IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 10-0035

PATRICK CHEFF,

Appellee/Cross-Appellant/Plaintiff,

v.

BNSF RAILWAY COMPANY, a Corporation,

Appellant/Cross-Appellee/Defendant.

CONSOLIDATED REPLY/RESPONSE BRIEF OF APPELLANT

On Appeal from the Eighth Judicial District Court
Cascade County Cause No. DV-08-1121
Honorable Dirk M. Sandefur

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I. THE DISTRICT COURT ERRED BY INVALIDATING THE RELEASE.

A. There Was No Mutual Mistake of Fact.

Only a mutual mistake as to the *nature of the injury* may void a release under FELA. *Bevacqua v. Union Pac. R.R. Co.*, 1998 MT 120, ¶ 70, 289 Mont. 36, 960 P.2d 273. The parties had a very clear understanding about the nature of Cheff's injury at the time of settlement. Cheff dismisses these undisputed facts as "mere attorney spin." (Cheff's Brief, p. 11.) But Cheff takes "spin" to an entirely new level.

The story Cheff *wants* to tell is clear enough: At the time of settlement, everyone knew Cheff would undergo surgery in a few days and obtain excellent relief, but a congenital condition of which the parties were unaware precluded him from ever having the surgery. Even if this story was true – and it is not – Cheff's theory still fails because there is no dispute the alleged workplace injury was accurately diagnosed, and the parties fully appreciated its extent and severity when they settled Cheff's claim for $300,000. But before addressing the legal infirmity of Cheff's theory, certain factual inaccuracies must be pointed out:

1. Cheff says he "did not have surgery on June 30th due to concerns about his EKG results." (Cheff's Brief, p. 10.) Not true. Just five days after settling his claim for $300,000, Cheff called and cancelled his scheduled

surgery. Dr. Hollis' records state: "On June 27th of '06, our front staff noted that the patient telephoned, and he wants to postpone surgery *presumably because he's feeling better*." (CR 125, 36:14-17 (emphasis added).) There are no facts suggesting the EKG results (issued *after* Cheff cancelled his surgery and which ultimately cleared him for surgery) impeded the procedure from going forward. (*See* CR 125, 35:13-36:20.)

2. Cheff claims he was only prevented from having the recommended surgery by a previously unknown congenital condition. Not true. Cheff initially called off the surgery because he was feeling better. (CR 125, 36:14-17.) And even months later, Dr. Hollis' notes indicate that Cheff "does not feel he needs surgical intervention." (CR 125, 37:9-38:3; *see also* CR 125, Ex. 46-9.)

3. Cheff acknowledges his workplace injury was accurately diagnosed. He now also acknowledges, as he must, that he knew about his congenitally short pedicles prior to settlement. Nonetheless, Cheff suggests that while he knew about "short pedicles," he had no idea about his "sagitally orientated facets and short lamina syndrome." (Cheff's Brief, p. 16.) Not true. Prior to settlement, Dr. Hollis explained the situation

to Cheff: "I have noted the risks given his fact [sic] anatomy, which are [sic] very sagitally orientated, there would be a 25-30% chance of delayed instability with a later need for fusion. He understands and understands the other risks of procedure including . . . failure of improvement, as well as recurrent disc herniation." (CR 125, Ex. 46-6 - 46-7.)

4. Cheff concedes he can still undergo surgery, but argues the surgery would have to be "of an entirely different nature." (Cheff's Brief, p. 12.) Not true. Dr. Hollis testified that "limited intervention," like a laminoforaminotomy, is still on the table. (CR 125, 53:25-14.) Indeed, concerns about Cheff's congenital condition only go to the difficulty of performing a fusion procedure *if the laminoforaminotomy results in instability.* (CR 125, 53:25-14.) That was always a risk – a *known* risk. (CR 125, Ex. 46-6 - 46-7.) While Dr. Hollis said a more serious procedure *may* be undertaken when surgery is deemed advisable at some point in the future, this only demonstrates that no one – not even a doctor – can say with certainty how one's future course of recovery will go. (CR 125, 53:25-14.) This is precisely why such uncertainty does not invalidate an otherwise valid release.

5. Remarkably, Cheff now asserts he did not know at the time of settlement that his injuries could get worse. (Cheff's Brief, p. 15.) Not true. There is no dispute Cheff told BNSF prior to settlement he knew his injuries "might get worse, might get better, or might remain the same." (CR 9, Ex. B.) He signed a release stating he was "permanently disabled," and testified he understood this provision when signing. (CR 108, 146:16-147:2.) Also, prior to settlement, his doctor informed him of the risks, making it quite clear his injury could get worse. (CR 125, Ex. 46-6 - 46-7.) Even if Cheff did believe his injury could only get better, his belief must be reasonable and the mistake must be mutual. *See Brophy v. Cincinnati, New Orleans & Texas Pac. Ry. Co.*, 855 F. Supp. 213, 217 (S.D. Ohio 1994).

6. Cheff's mutual mistake theory hinges on the notion that both parties knew the scheduled laminoforaminotamy would go forward and would be successful. Not true. Neither party claimed to know the future. To the contrary, Cheff's doctor advised him of the risks of surgery prior to settlement, and specifically the risks posed by his congenital condition. Further, the release Cheff executed proves the occurrence of the surgery, as well as its outcome, were merely recognized possibilities: "As a result

of these injuries, future medical care, including surgery (L3-4 laminoforaminotomy), *may be necessary*. . . ." (CR 9, Ex. C (emphasis added).)

* * *

Cheff's facts on mutual mistake do not withstand scrutiny. But even if his version of events was adopted wholesale, BNSF is still entitled to summary judgment. Whether the parties fully understood the effects Cheff's congenital condition would have on his future course of recovery is legally irrelevant because the nature of his injury was fully understood. It was accurately diagnosed, and there is no suggestion it is any more severe than anticipated. An unrelated condition or occurrence that interferes with one's course of recovery does *not* create a mutual mistake of fact. *See Manis v. CSX Transp., Inc.*, 806 F. Supp. 177, 179 (N.D. Ohio 1992).

Cheff's legal analysis on mutual mistake is comprised primarily of broad legal propositions. But the facts of the cases he cites demonstrate why mutual mistake is not applicable here. Indeed, the only mutual mistake case Cheff addresses with any specificity is *Whitten v. Burlington Northern & Santa Fe Ry. Co.*, U.S. District Court, District of Montana, CV 98-163-M-DWM (April 19, 2000). Cheff argues "there is no distinction between the rationale of the federal court in *Whitten* and the

argument of the plaintiff in this case." (Cheff's Brief, p. 24.) But the facts of these two cases are worlds apart. In *Whitten*, the parties settled for a minimal amount, "believ[ing] Whitten had no serious medical problem," but he suddenly lost all feeling in his legs and began to experience incontinence and paraplegia. (App. A.) He was diagnosed with cauda equina syndrome, which was a direct consequence of his *work-related injury*. (App. A.)

Cheff also suggests *Graham v. Atchison, T. & S.F. Ry. Co.*, 176 F.2d 819, 824-25 (9th Cir. 1949) is analogous. In *Graham*, the plaintiff's doctor failed to inform him about his "true condition" – a crushed disc – prior to settlement. *See id.* *Graham*, just like *Whitten* and other FELA cases on mutual mistake, only refutes Cheff's theory.

Invalidating the release was error. Even disregarding Cheff's factual inaccuracies, parties are not required to foretell a person's future course of recovery to legitimately settle disputed claims. *See Robertson v. Douglas Steamship Co.*, 510 F.2d 829, 836 (5th Cir. 1975).

B. There Was No Fraudulent Inducement.

Cheff largely ignores the District Court's erroneous application of a lesser state law standard to the question of fraudulent inducement. Cheff does not dispute the validity of a release under FELA is governed by federal law. *See Bevacqua*,

¶ 70. The "correct federal rule" requires a showing of *actual intent*, including "deliberately false and material statements . . . made to deceive the employee . . . ." *See Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359, 362 (1952). It is error to require anything less to invalidate a release. *See Counts v. Burlington Northern R.R. Co.*, 952 F.2d 1136, 1141 (9th Cir. 1991); *Sinclair v. Burlington Northern & Santa Fe Ry. Co.*, 2008 MT 424, ¶¶ 13, 35, 347 Mont. 395, 200 P.3d 46.

The District Court did not apply "the correct federal rule." *See Dice*, 342 U.S. at 362. It expressly found Cheff had *not* established a deliberate misrepresentation of any kind. (App. D, p. 121.) Still, it invalidated the release on the basis of *constructive fraud* under *state law*, which is established when one creates a false impression "*without actual intent to deceive.*" (App. D, p. 123 (emphasis added).)

Cheff disregards this fatal flaw in the District Court's rationale. His only reference to the issue – albeit an indirect one – is his brief discussion of *Faulkenberry v. Kansas City Southern Ry. Co.*, 602 P.2d 203 (Okla. 1979). (*See* Cheff's Brief, p. 19.) *Faulkenberry* contains dicta suggesting constructive fraud may be relevant to the validity of a release. *Id.* at 205-06. But even assuming the Oklahoma Supreme Court's take on the correct federal standard in 1979 trumps more recent federal precedent, *Faulkenberry* did not go so far as to invalidate the release – the issue of fraud was given to the jury. *See id.*

Cheff had to demonstrate the elements of fraud in the inducement, including actual intent. *See Dice*, 342 U.S. at 362. Even the District Court acknowledged he did not meet this burden. (App. A, p. 3; App. D, p. 121.)

C. The Release Was Supported by Consideration.

The District Court also invalidated the release for want of consideration. Cheff was not otherwise entitled to the $300,000 he received, however, Cheff correctly notes the issue is one of alleged "*partial* failure of consideration." (Cheff's Brief, p. 3 (emphasis added).)

The so-called "peppercorn doctrine" – the rule that "but a peppercorn" will suffice as valid consideration in the eyes of the law – has been traced to Blackstone. *See* 2 William Blackstone, Commentaries on the Laws of England 440 (5th ed. 1773). And while this is not a case of nominal consideration ($300,000 is a very large "peppercorn"), the doctrine does underscore the fact that it is not for a court to determine, after the fact, what price would be fair or adequate under an agreement between two private parties. *See, e.g., Pilarczyk v. Morrison Knudsen Corp.*, 965 F. Supp. 311, 322 (N.D.N.Y. 1997) *aff'd,* 162 F.3d 1148 (2d Cir. 1998) (in the absence of fraud or unconscionability, the adequacy of consideration is not a proper subject of judicial review).[1]

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[1] In Montana, a written contract is presumed to contain sufficient consideration, and *any* benefit conferred constitutes sufficient consideration.

FELA law is in accord. The question is not whether the plaintiff should have received more or less, but whether "something of value is received to which the creditor had no previous right." *Maynard v. Durham & Southern Ry. Co.*, 365 U.S. 160, 163 (1961) (emphasis added). That question is undisputed here. The $300,000 – identified in the release as the "SOLE CONSIDERATION" – was not for wages or some benefit Cheff would have been due regardless of settlement. (CR 9, Ex. C.)

The Ninth Circuit has specifically rejected the idea that a court or jury can second-guess the adequacy of consideration. *See Counts*, 952 F.2d at 1140. In *Counts*, a jury instruction that "[a] release is not supported by adequate consideration if there is a large disparity between the amount of the release and the actual monetary loss" was deemed improper. *Id.* Because the employee received something to which he had no previous right – though arguably inadequate – the issue of consideration should not have been submitted to the jury. *See id.* The same is true here.

D. Disputed Issues of Fact Were Disregarded.

The District Court ruled Cheff was misled by a provision which provided BNSF would accept billing for medical expenses arising from the L3-4 back injury for a period of one year from the date of the release. (CR 9, Ex. C.) That point is very much disputed.

Mont. Code Ann. §§ 28-2-801, 28-2-804; *Edgar v. Hunt*, 218 Mont. 30, 706 P.2d 120 (1985).

Ironically, the only reason the subject provision was included in the release at all is because *Cheff specifically asked for it.* (CR 23, Ex. 1, 67:12-69:13.) As Gregg Keller testified: "He wanted a, what we considered that medical clause in there. He asked if it was a possibility. And I said yes, we can generally do it for six months to a year. So he asked if I could put a year in there." (CR 23, Ex. 1, 67:12-69:13.)

The District Court concluded that Cheff's requested provision was misleading because Cheff would have been entitled to medical benefits during this period anyway. (App. D, pp. 127-28.) But that is also disputed. BNSF presented evidence that insurance benefits end on the date an employee resigns as part of an out-of-service settlement. (June 16, 2009, Hearing Tr., pp. 86-94.) Further, Greg Keller testified that Cheff was informed of this prior to settlement (this is why the parties post-dated Cheff's resignation) and was also instructed to check with his insurance to confirm:

> [A]s I explained to him, if we didn't postdate his resignation, that the day that he signed this agreement, that's the day his benefits would stop. So that would sever his ability to get insurance or anything else. . . .
>
> [I]f I put the date that we did this release on 06-22-06, that ends his benefits under the collective bargaining agreement because he resigned.
>
> He was told to check with his insurance company and to verify how long, how far out his benefits go. And I believe it's two years from the last date of compensated service. So by putting 2010 out there, I made sure I didn't inadvertently take any benefit away from him that he was entitled to.

(CR 121, 70:23-71:15.)

Nothing misleading can be inferred from BNSF's conduct. If anything, it shows a desire to accommodate Cheff and ensure his coverage was not interrupted. Regardless, the District Court erred by overlooking disputed facts.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ADMIT EVIDENCE THAT CHEFF ORIGINALLY ATTRIBUTED HIS BACK INJURY TO WEIGHTLIFTING.

The District Court excluded evidence that Cheff told two caregivers his injury was caused by weightlifting "for the reason that proof of causation requires expert medical testimony." (*See* Cheff's Brief, p. 4.) Recognizing the precarious nature of this holding, Cheff's focus on appeal has shifted to supposed foundational deficiencies in medical records Cheff produced. Under either theory, the evidence should have been admitted.

A. A Defendant May Challenge Causation Without Expert Testimony.

Had BNSF pursued an apportionment defense under Montana law, it would have been required to present expert medical evidence that Cheff's injury was divisible. *See Clark v. Bell*, 2009 MT 390, ¶ 16, 353 Mont. 331, 220 P.3d 650. But BNSF did not seek to argue apportionment at trial, and Montana law would not have governed even if it had. *See St. Louis Southwestern R. Co. v. Dickerson*, 470 U.S. 409, 411 (1985). The District Court's reliance on *Truman v. Montana Eleventh*

Judicial Dist. Court, 2003 MT 91, 315 Mont. 165, 68 P.3d 654 was misplaced. Expert medical testimony is *not* required where the defendant seeks to present evidence to disprove causation – an element that was *Cheff's burden* to prove. *See Henricksen v. State*, 2004 MT 20, ¶ 20, 319 Mont. 307, 84 P.3d 38.

At various points in his brief, Cheff attempts to obfuscate this issue by suggesting BNSF did, in fact, pursue an apportionment defense. Cheff claims BNSF raised the defense in its Answer. (*See* Cheff's Brief, p. 27.) But BNSF's Answer demonstrates its defense with respect to the subject evidence was always one of alternate causation. (CR 8, p. 2.) Regardless, the pretrial order, which supercedes the pleadings, contained no apportionment defense and specified that BNSF would challenge whether Cheff's injuries were "causally related" to a breach of care by BNSF. (CR 68, p. 17.) Moreover, prior to trial, BNSF reiterated the issue "is not one of apportionment at all. The evidence that BNSF is prepared to present at trial demonstrates alternate cause." (*See* CR 98, p. 1.)

Cheff also ignores BNSF's discussion that, had it argued apportionment, the defense would be governed by *federal law*. *See Dickerson*, 470 U.S. at 411. The federal standard is different than Montana's and does not require that divisibility of injury be proven to a reasonable medical probability. *See Sauer v. BNSF Ry.*, 106 F.3d 1490, 1494 (10th Cir. 1997).

Because BNSF did not raise apportionment at trial, the propriety of the District Court's decision comes down to its express finding that expert medical testimony is required in all cases where a defendant wishes to present evidence of "a distinctly independent alternative cause." (App. C, p. 3.) The District Court abused its discretion in failing to recognize an important distinction: "[T]he distinction that it's independent causation evidence as opposed to apportionment evidence still comes back to the same evidentiary standard. . . ." (Trial Tr., p. 11.)

Contrary to the District Court's expansive interpretation of *Truman*, this Court has since made clear that "*Truman* did not disturb the basic right to challenge causation . . . ." *Clark*, ¶ 23. Rather, *Truman* and its progeny hold that a defendant must prove divisibility of injury "if a defendant asserts he or she is only liable for *a portion of* [the plaintiff's] damages . . . ." *Id.* (emphasis in original). Because BNSF did not argue apportionment, it was not required to present expert medical testimony on causation. *See id.; see also Cain v. Stevenson*, 218 Mont. 101, 105, 706 P.2d 128, 131 (1985) (even a plaintiff can sustain his burden in some cases without expert medical evidence).

B. The Evidence Was Not Lacking Foundation.

Uncomfortable with the District Court's application of *Truman*, Cheff modifies his argument to focus on alleged foundational deficiencies. But the District

Court specifically observed that its ruling was based on *Truman* and lack of expert medical testimony on alternate cause, not the "evidentiary competence" of the medical records:

> As far as the Court is concerned – and I won't belabor this any further – the ruling that I've made on this, both pretrial and then again on subsequent review here yesterday and today, isn't based upon the evidentiary competence of these records; it's based upon the substance of these records and the substance of the opinions we have, assuming that there's not an evidentiary competence issue.

(Trial Tr., p. 299.)

Tellingly, Cheff does little to defend the District Court's analysis. In particular, he abandons its attempt to distinguish *Clark* when it found (incorrectly) that BNSF failed to introduce the subject evidence "for the purpose of cross-examining *Plaintiff's medical expert* about the bases of his causation testimony as in *Clark.*" (App. C, pp. 8-9.) Instead, Cheff argues that "*Clark* did not address the foundation and hearsay issues raised in this case." (Cheff's Brief, p. 33.) Again, foundation and hearsay had nothing to do with the District Court's decision.

Cheff complains "BNSF did not attempt to establish any of the evidentiary foundation from the authors of the records" (Cheff's Brief, p. 33), but ignores the fact that BNSF was *never afforded an opportunity* to lay foundation. The District Court excluded the records on an entirely different basis (apportionment under *Truman*) long before foundation needed to be established. Cheff falsely argues that

"BNSF made clear that it simply intended to offer the unsworn, out of court remarks included in the records without any further foundation." (*See* Cheff's Brief, p. 30.) But the portion of the trial transcript cited by Cheff shows only that BNSF made an offer of proof describing the subject evidence. Foundation was not even discussed. (Trial Tr., pp. 292-94.) The fact is, if BNSF had to lay foundation for the documents, it easily could have done so. Cheff is trying to reconstruct what actually happened at trial to suggest a new basis for a flawed decision.

Moreover, the medical records were produced to BNSF *by Cheff.* The specific records at issue were even listed on Cheff's own exhibit list. (*See* CR 62.) To now claim that foundation was proper for all medical records *except* the two that documented Cheff's original story on how he was injured is telling. Cheff's argument has nothing to do with concerns about the reliability of the evidence.

Nor does Cheff's cited authority support his position. He cites three Montana cases for the idea that "unsworn medical reports of a third person not called as a witness and available for cross examination are hearsay and inadmissible." (*See* Cheff's Brief, p. 33.) But even Cheff appears to acknowledge that a hearsay exception applies here. (*See* Cheff's Brief, p. 33.) The statements are admissions by a party opponent and are, by definition, not hearsay. Mont. R. Evid. 801(d)(2). And even if they were, Rule 803(4) provides a hearsay exception for: "Statements made

for the purposes of medical diagnoses or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." The Advisory Committee Notes to the identical federal rule recognize the "guarantee of trustworthiness" associated with a patient's statements on causation to caregivers, given "the patient's strong motivation to be truthful." *See* Advisory Committee Notes to Fed. R. Evid. 803(4). The medical records here fall squarely within this exception. The three Montana cases cited by Cheff, by contrast, involved situations where no hearsay exception applied. *See Pannoni v. Bd. of Trustees*, 2004 MT 130, ¶ 48, 321 Mont. 311, 90 P.3d 438; *Pickett v. Kyger*, 151 Mont. 87, 439 P.2d 57 (1968); *Shilingstad v. Nelson*, 141 Mont. 412, 378 P.2d 393 (1963).

Cheff also argues alleged foundation and hearsay problems render the evidence unfairly prejudicial under Rule 403. But it is hard to imagine how a plaintiff's own statements about the cause of his or her injury could ever be considered *unfairly* prejudicial. *See* Mont. R. Evid. 403. Cheff blithely declares the statements have no real probative value because he now denies making them. That Cheff now denies making two nearly identical statements, contained in the records of

two different medical providers, only underscores their importance and demonstrates the unfairness in keeping the truth from the jury.

In addition, the probative value of the evidence is not diminished by the fact that Dr. Hollis did not change his ultimate opinion. When Dr. Hollis learned for the first time from BNSF's counsel that Cheff originally blamed weightlifting for his injury, the doctor said he would have to talk to Cheff before making any changes and would stick with the story he heard from his patient for the time being. (CR 125, 65:1-4.) That said, Dr. Hollis testified (though the testimony was not admitted) that if Cheff had told his original story and stuck with it, the doctor's conclusion would have been different. (CR 125, 63:18-64:6.) The fact that Dr. Hollis chose not to immediately discount what Cheff had told him is unremarkable. Dr. Hollis testified he never veers from the patient's story unless the patient's behavior is "clearly aberrant." (CR 125, 60:24-61:10.)

The cases cited by Cheff on this point are so clearly distinguishable they require little discussion. In *State v. Passmore*, 2010 MT 34, 355 Mont. 187, 225 P.3d 1229, evidence the rape victim once told a third party she had imagined being bound and tickled was found to be unfairly prejudicial. *See id.* at ¶ 63.

In *Sitton v. Cole*, 521 S.E.2d 739, 740 (N.C. App. 1999), a medical record was excluded because it was more than 10 years old, no one could identify who made the

"vague notation regarding plaintiff's condition," and it was unclear whether the particular notation referred to an injury, illness or symptom.

In *Taylor v. National R.R. Passenger Corp.*, 920 F.2d 1372, 1375-76 (7th Cir. 1990), the employee's 14-year-old military medical records were inadmissible collateral evidence offered for impeachment.

Finally, in *Henricksen*, evidence about the plaintiff's other life stressors was excluded because no evidence suggested her current claims were in any way related: "The State is not entitled to embark upon an unbridled fishing expedition into Kristin's life, spanning years far-removed from the present case, in an attempt to fashion some alternate cause for her current claims." *Henricksen*, ¶¶ 67-70. Wanting to present evidence of Cheff's own statements about the cause of his injury is hardly a "fishing expedition."

Unlike the evidence at issue in the cases cited by Cheff, the probative value of Cheff's early statements to caregivers about how he hurt himself cannot be questioned. Excluding the evidence with an expansive interpretation of an inapplicable state law rule was an abuse of discretion.

III. THE DISTRICT COURT ERRED IN REFUSING TO AWARD INTEREST ON THE $300,000 OFFSET.

Cheff argues that "BNSF is not entitled to the use of money which a jury ultimately determined belonged to Pat Cheff." (Cheff's Brief, p. 36.) But the issue

of the release was never submitted to the jury. The District Court rescinded the release on Cheff's motion for summary judgment. If that decision stands, the payee (BNSF) is entitled to return of the monies paid under the rescinded contract, plus interest. *See Brunner v. LaCasse*, 234 Mont. 368, 371, 763 P.2d 662, 664 (1988).

IV. EVIDENCE OF CONTRIBUTORY NEGLIGENCE WAS PROPERLY ADMITTED.

FELA provides "contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. Cheff claims there was a "complete lack of evidence" he failed to exercise due care. (*See* Cheff's Brief, p. 40.) The jury found otherwise, assessing Cheff's negligence at 15%.

A defendant in a FELA action is entitled to an instruction on contributory negligence if there is "any evidence at all of contributory negligence." *See Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309, 1314 (9th Cir. 1986). Damages and contributory negligence are normally so interwoven in a FELA case that it is rarely proper to submit the question of damages without also permitting the jury to consider the plaintiff's conduct at the time of the injury. *Norfolk Southern R.R. v. Ferebee*, 238 U.S. 269, 273 (1914). In addition, the same FELA causation standard that allows plaintiffs to reach the jury on a very slim showing of negligence permits defendants to argue contributory negligence with an equally slim showing. *Legette*

v. National R.R. Passenger Corp., 478 F. Supp. 1069, 1073 (E.D. Pa. 1979); *see also Norfolk Southern Ry. v. Sorrell*, 549 U.S. 158, 170 (2007).

Cheff argues the defense BNSF raised at trial was really an improper assumption of risk defense. Not so. Although there is some overlap between assumption of risk and contributory negligence, the two defenses are not generally interchangeable. *See Taylor*, 787 F.2d at 1316. At common law, an employee's voluntary acceptance of a dangerous condition that is necessary for him to perform his duties constitutes an assumption of risk. *Id.* Contributory negligence, in contrast, is a careless act or omission on the plaintiff's part contributing to his or her injury. *Id.* Assumption of risk is not a defense under FELA, but evidence of contributory negligence cannot be denied merely because it may also be pertinent to assumption of risk. *Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 978 (8th Cir. 1995).

In a FELA case, when reasonable alternatives besides quitting or refusing to perform the task in an unsafe way are available, a plaintiff is charged with acting with due care and will be held responsible for contributory negligence. *Fashauer v. New Jersey Rail Operations*, 57 F.3d 1269, 1280 (3d Cir. 1995). Such was the case here. The jury heard testimony that Cheff, who was born and raised in Whitefish, Montana, did not even look for accumulations of ice and snow as he walked down

the narrow gravel pathway where he allegedly fell in January 2006. (Trial Tr., pp. 181-200.) Instead of using the main entrance to the building, Cheff chose to go around to the west side. (Trial Tr., pp. 181-200.) As Cheff testified, one can expect snow and ice in January in Whitefish and should be alert to the danger. (Trial Tr., pp. 181-84.) Yet, as he proceeded down the narrow path he had chosen to take, he was looking ahead and "I didn't even notice whether there was ice or snow." (Trial Tr., pp. 199-200.) Not looking for known hazards is sufficient evidence of contributory negligence. *See, e.g., Wise v. Union Pacific R.R. Co.*, 815 F.2d 55, 57 (8th Cir. 1987) (evidence that employee failed to look down at the ground as he stepped off a ladder "states a submissible case of contributory negligence"). After he fell, Cheff did not report the alleged condition to anyone or take any steps to fix it. (Trial Tr., pp. 181-200.)

Failure to choose a safer alternative route and failure to look where he was going was failure to exercise due care, and due care was Cheff's obligation. *See Fashauer*, 57 F.3d at 1280. The jury correctly found his conduct contributed to his injury.

V. THE DISTRICT COURT PROPERLY AWARDED THE $300,000 OFFSET.

The parties entered a contract. The District Court, upon Cheff's motion, rescinded the contract. Upon contract rescission, the District Court was obligated to

return the parties to their prior positions, which necessarily included returning the $300,000 to BNSF. *See, e.g., Cady v. Burton*, 257 Mont. 529, 538, 851 P.2d 1047, 1053 (1993); Mont. Code Ann. §§ 28-2-1715, 28-2-1716. The cases cited by Cheff, which involved *collateral source offsets*, are inapposite. *See Busta v. Columbus Hosp. Corp.*, 276 Mont. 342, 374-75, 916 P.2d 122, 141-42 (1996); *Tucker v. Farmers Ins. Exchange*, 2009 MT 247, ¶¶ 48-59, 351 Mont. 448, 215 P.3d 1.

Under FELA, an employee attacking a previously executed release for fraud or mutual mistake is not required, as a condition to bringing suit, to tender back the consideration he received. *Hogue v. Southern R. Co.*, 390 U.S. 516, 518 (1968). Although no such prerequisite to filing suit exists, the rule is that "the sum paid shall be deducted from *any award* determined to be due to the injured employee." *Id.* (emphasis added). Contrary to Cheff's argument, he cannot move to rescind the contract and still pocket the money paid to him under the contract.

DATED this 2nd day of July, 2010.

BOONE KARLBERG P.C.

By _____
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11of the Montana Rules of Appellate Procedure, I certify that the foregoing CONSOLIDATED REPLY/RESPONSE BRIEF OF APPELLANT is proportionately spaced, printed with the typeface Times New Roman, 14 point font, is double-spaced, and contains approximately 4,999 words, excluding the Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

DATED this 2nd day of July, 2010.

BOONE KARLBERG P.C.

By _____
Randy J. Cox
Scott M. Stearns
Attorneys for Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing CONSOLIDATED REPLY/RESPONSE BRIEF OF APPELLANT with the Clerk of the Montana Supreme Court; and that I have served true and accurate copies of the foregoing CONSOLIDATED REPLY/RESPONSE BRIEF OF APPELLANT upon each attorney of record in the above-referenced District Court action, as follows:

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